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In The

Supreme Court of the United States

SNELL ISLAND SNF, LLC d/b/a SHORE ACRES REHABILITATION AND NURSING CENTER, LLC, and HGOP, LLC d/b/a CAMBRIDGE QUALITY CARE, LLC,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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September 11, 2009

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QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board acted lawfully and within its statutory authority by delegating all of its powers to a three-member group with the knowledge and intent that only two members would remain to issue decisions and orders, and by thereafter continuing to issue decisions and orders in unfair labor practice and representation cases with only two sitting and participating members.

LIST OF PARTIES TO THE PROCEEDINGS

Snell Island SNF, LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC and HGOP, LLC d/b/a Cambridge Quality Care, LLC, Joint Employers, (collectively "Snell Island"), were respondents before the National Labor Relations Board and petitioners in the court of appeals.

Respondent National Labor Relations Board was respondent in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Snell Island SNF, LLC and HGOP, LLC certify that they have no parent companies and there are no publicly-held companies having a 10 percent or greater ownership interest in either corporation.

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Snell Island SNF, LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC and HGOP, LLC d/b/a Cambridge Quality Care, LLC, Joint Employers, (collectively "Snell Island"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-33) issued on June 17, 2009 and is reported at 568 F.3d 410. The National Labor Relations Board's ("Board") Decision and Certification of Representative issued on March 13, 2008 (App. 45-47) and is unreported. The Board's Decision and Order issued on July 18, 2008 (App. 34-44) and is reported at 352 NLRB No. 106.

JURISDICTION

The court of appeals entered its judgment on June 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1)

STATUTORY PROVISION INVOLVED

Section 3 (b) of the National Labor Relations Act, 29 U.S.C. § 153 (b) is set forth below:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate

> and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

STATEMENT OF CASE

Prior to December 16, 2007, the Board was at its full statutory membership. The five sitting members were Chairman Robert Battista, Member Wilma Liebman, Member Peter Schaumber, Member Dennis Walsh, and Member Peter Kirsanow. On December 16, 2007, Board Chairman Battista's term expired. On December 20, 2007, the Board, acting through its remaining four members, temporarily delegated all of its powers to Members Liebman, Schaumber, and Kirsanow, acting as a three-member group. This temporary delegation, to be effective December 28, 2007, was made in anticipation of the impending expiration of the recess appointments of Members

Kirsanow and Walsh at the expiration of the then-current session of Congress. Relying upon an Opinion of the United States Department of Justice Office of Legal Counsel ("OLC"), which the Board solicited and agreed to be bound by, the Board decided that it would continue to issue decisions and orders despite having only two members. (App. 48-51). The recess appointments of Members Walsh and Kirsanow expired on December 31, 2007, and since January 1, 2008, the Board has been functioning with two members, Liebman and Schaumber.

Snell Island filed timely Election Objections to a representation election conducted by the Board on December 12, 2007. On January 18, 2008, the Board's Regional Director issued a Report on Objections recommending that these Objections be overruled. Snell Island filed timely Exceptions to the Regional Director's Report. On March 13, 2008, Member Liebman and Chairman Schaumber, purporting to act as a quorum of a three-member panel that included the previously departed Member Kirsanow, denied these Exceptions and issued a Decision and Certification of Representative. (App. 45-47).

In order to test the certification, Snell Island refused to recognize or bargain with the Union. On May 16, 2008, the Union filed an unfair labor practice charge (12-CA-25854). On July 18, 2008, Member Liebman and Chairman Schaumber issued a Decision and Order finding that Snell Island had violated Sections 8(a)(5) and (1) of the Act. The Board ordered that Snell Island recognize and bargain with the Union. (App. 34-44).

Snell Island filed its petition for review in the United States Court of Appeals for the Second Circuit on August 14, 2008. The court of appeals had jurisdiction of this petition pursuant to 29 U.S.C. § 160(f). The Board subsequently filed a cross-petition seeking enforcement of its order. The court of appeals had jurisdiction of this cross-petition pursuant to 29 U.S.C. § 160(e). The primary issue raised in the Second Circuit was the Board's power, under § 3 (b), to issue the two decisions being reviewed. Oral argument was held on April 15, 2009. On June 17, 2009, the court of appeals issued its Opinion finding that the Board's position that it was entitled to continue issuing decisions and orders after its membership dropped to two members was a reasonable interpretation of § 3(b), albeit not the only reasonable interpretation, and that deference under *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1984) was warranted. The court of appeals enforced the Board's order. (App. 1-33).

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision deepens the split that exists among the circuits regarding whether, under § 3(b) of the Act, the Board—consisting of only two members—has the power to issue final decisions and orders in unfair labor practice and representation cases. The Second Circuit's decision squarely conflicts with the decision of the United States Court of Appeals for the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, *rehearing en banc denied*, (D.C. Cir. 2009). The Second Circuit erred not only in its interpretation of § 3(b), but in its decision to apply *Chevron* deference inasmuch as the Board never *decided* the statutory interpretation issue under § 3(b)

and never suggested to the court of appeals that a *Chevron* analysis was applicable. The issue presented is one of immense significance—never decided by the Court—that affects every decision issued by the two-member Board since January 1, 2008. The Court should grant certiorari to resolve the circuit court split, settle definitively the powers of a two-member Board, and correct the Second Circuit's error.

I. THE FOUR COURTS THAT HAVE CONSIDERED THE TWO-MEMBER BOARD ISSUE HAVE APPLIED FOUR UNIQUE ANALYSES.

The Second Circuit is the fourth court of appeals to address the specific issue of the Board's power under section 3(b) to issue final decisions and orders with only two sitting members. Although the score card currently rests at three to one in favor of the Board's power to issue two-member decisions, all four courts have followed distinct analytical approaches.

A. The First Circuit's Analysis

On March 13, 2009, the United States Court of Appeals for the First Circuit issued its decision in *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), finding that the Board was empowered to issue two-member decisions. The court's analysis was short and failed to discuss the import of the provision in § 3(b) that the Board's quorum was "at all times" three members:

> The Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was

> lawful under the plain text of section 3(b). First, section 3(b) allowed the Board to delegate all of its powers to a three-member group. Second, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." The vacancy, which left the two-member quorum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board.

Id. at 41.

B. The D.C. Circuit's Analysis

On May 1, 2009, the United States Court of Appeals for the D.C. Circuit issued its decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, *rehearing en banc denied,* (D.C. Cir. 2009), finding that the two-member Board was without power to issue final orders and decisions. The D.C. Circuit found it unnecessary to decide whether the Board's delegation of powers to a three-member group, knowing that only two would remain to decide cases, was a "sham," as it concluded that the case could be resolved on the basis of the Board's lack of a quorum. The court focused on the statutory requirement for a three-member quorum "at all times" and rejected the Board's contention that the two-member quorum of a three-member group was an "exception" that effectively overrode the three-member quorum requirement.

In rejecting the Board's argument, the D.C. Circuit explained:

> Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied "*at all times*." 29 U.S.C. § 153(b) (emphasis added). Moreover, it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's language does not eliminate the requirement that a quorum of the *Board* is three members. Rather, it states only that the quorum of any three-member *delegee group* shall be two. *Id.* The use of the word "except" is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. *See id.* The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied. *Id.* But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.

Id. at 472-473.

The court, citing the Restatement (Third) of Agency § 3.07(4) (2006), noted that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." *Id.* at 473. The court thus concluded:

> In the context of a board-like entity, a delegee's authority therefore ceases the moment that vacancies or disqualifications on the board reduce the board's membership below a quorum. It must be remembered that the delegee committee does not act on its own behalf. The statute confers no authority on such a body; it only permits its creation. The only authority by which the committee can act is that of the Board. If the Board has no authority, it follows that the committee has none. The delegee's authority to act on behalf of the Board therefore ceased the moment the Board's membership dropped below its quorum requirement of three members.

Id.

C. The Seventh Circuit's Analysis

On the same day that the D.C. Circuit issued its decision in *Laurel Baye,* the United States Court of Appeals for the Seventh Circuit issued its decision in *New Process Steel, L.P. v. NLRB,* 564 F.3d 840 (7th Cir. 2009). Like the First Circuit, the court gave no consideration to the import of the § 3(b) mandate that "three members of the Board shall, at all times, constitute a quorum of the Board," choosing to focus instead on the vacancies and delegee group quorum provisions. The court concluded:

> The NLRB argues that the statute at issue is clear that the vacancy of one member of a three member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB. As the NLRB

> delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text. As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

Id. at 845-846.

Although the Seventh Circuit was of the view that the meaning of the statutory language was "plain" and that resort to legislative history was unnecessary, it nevertheless found that the legislative history failed to affirmatively support the employer's proffered interpretation of the statute. *Id.* at 847. Finally, the court rejected the contention that the Board panel was not properly constituted because it failed to include three members at the time the case was assigned to the panel. The court distinguished this Court's decision in *Nguyen v. United States*, 539 U.S. 69 (2003), which held that under 28 U.S.C. § 46, a court of appeals panel that did not include three Article III judges in the first instance was improperly constituted and its decision could not be saved simply because two Article III judges concurred in the decision. In the Seventh Circuit's view, the two statutes were

materially different and thus no useful analogy could be drawn. *Id.* at 848.

D. The Second Circuit's Analysis

Well in advance of issuing its decision, the Second Circuit had the benefit of the three court decisions described above. After reviewing these decisions, the court of appeals candidly acknowledged the divergent approaches:

> To summarize, one of our sister circuits—the Seventh Circuit—has upheld a decision by the two-member NLRB panel based on the "plain meaning" of section 3(b) of the Act, noting that its interpretation comports with the legislative history of relevant amendments to the Act, without discussing principles of agency (i.e. principal-agent) law. [citation omitted] Another of our sister circuits—the D.C. Circuit—has overturned a decision by the same two-member panel based on the plain language of section 3(b) of the Act, noting that its interpretation comports with applicable principles of agency law, but without discussing the applicable legislative history. [citation omitted] A third sister circuit—the First Circuit—has concluded that the "plain text" of the Act authorized the decisions by the same two-member panel, without either discussing the legislative history or relevant principles of agency law. [citation omitted]
>
> The question regarding the jurisdiction of the NLRB's two-member panel is one ultimately to be resolved by the Supreme Court. In the

> meantime, we must make a determination in the present case.

(App. 18-19).

The court of appeals then deepened the existing split by applying the two-step analysis of *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1984), an analysis that the Board had never suggested was appropriate. (App. 10-13). Following this approach, the court of appeals first addressed whether the meaning of section 3(b) was "plain." The court of appeals agreed with the First Circuit that the initial delegation of powers to a three-member panel, knowing that only two would remain to decide cases, was not improper: "That the NLRB knew that the membership of the panel would soon be reduced from three to two—and that Board's membership would also decrease to two—has no bearing on the fact that the panel was lawfully constituted in the first instance." (App. 20). Next, the court of appeals agreed with the D.C. Circuit that the Board's statutory quorum of three members must be satisfied "at all times," but concluded that this did "not answer the precise question presented here: once the Board has lost its quorum, what happens to a panel that was duly constituted before the Board lost its quorum?" (App. 22). Further, whereas the D.C. Circuit had relied upon principal/agency law to conclude that the delegee group lost its power when the Board lost its quorum, the court of appeals chose to look to the pertinent legislative history. (App. 22-23). After reviewing in some detail the legislative history of Taft-Hartley, the court of appeals concluded that this legislative history "lacks any clear statement of intent regarding the jurisdiction of a plenipotentiary panel where the Board

loses its quorum—the precise question that we face in this case." (App. 28-29).

Having concluded that the statutory language was ambiguous, the court of appeals turned to step two of the *Chevron* analysis, whether the Board's interpretation was a reasonable interpretation to which the court of appeals was required to defer. Under this deferential standard of review, the court of appeals concluded that the Board's interpretation was "reasonable" and thus should be upheld:

> The NLRB's interpretation of the Act is straightforward. The Act expressly permits the NLRB to delegate all or part of its powers to a three-member panel, for which two members constitute a quorum. *See* 29 U.S.C. § 153(b). Although the Act does not expressly provide that a panel retains jurisdiction where the Board loses its quorum, neither does the Act state that the panel loses jurisdiction in such circumstances. In light of the animating purpose of the Taft-Hartley amendments at issue here, which permitted the NLRB to continue to operate in panels of as few as two members in order to increase the Board's overall efficiency, the NLRB interprets the Act as permitting the two remaining members of the Board to issue labor decisions despite the Board's lack of a quorum.
>
> In our view, this is a reasonable interpretation of the statute. Indeed, we commend the NLRB for its conscientious efforts to stay "open for business" in the face of vacancies that it did not create and for which it

> lacked the authority to fill. Of course, the D.C. Circuit's view that where a Board loses its authority, so does its panels, *see* Laurel Baye Healthcare, 564 F.3d at 473, is also a reasonable interpretation of the Act. However, in applying *Chevron* deference, an agency's "view governs if it is a reasonable interpretation of the statute-not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, --- U.S. --, 129 S.Ct. 1498, 1505, 173 L.Ed.2d 369 (2009) (emphasis omitted).

(App. 29-30).

II. THE DECISION OF THE COURT OF APPEALS CLEARLY AND DIRECTLY CONFLICTS WITH THE D.C. CIRCUIT'S *LAUREL BAYE* DECISION. IT ALSO CONFLICTS IN CERTAIN RESPECTS WITH THE DECISIONS OF THE FIRST AND SEVENTH CIRCUITS.

The court of appeals' decision is clearly and directly in conflict with the decision of the United States Court of Appeals for the D.C. Circuit in *Laurel Baye*. On identical facts, the two courts reached polar opposite legal conclusions on the same statutory construction issue. Whereas the D.C. Circuit held that the two-member Board is without power to issue final decisions and orders, the court of appeals concluded that the two-member Board was so empowered. These decisions are simply not reconcilable.

Although the ultimate conclusion reached by the court of appeals is in harmony with the decisions of the First Circuit in *Northeastern Land Services* and the Seventh Circuit in *New Process Steel,* the analytical paths followed by these courts are in conflict. Contrary to the First and Seventh Circuits, the court of appeals concluded that the meaning of § 3(b) was not "plain," even when considered in conjunction with the legislative history. In applying a *Chevron* deference approach, and asking whether the Board's interpretation was "reasonable," the court of appeals charted completely new territory. The Board had not even suggested a *Chevron* deference analysis, most likely because, as discussed more fully below, the Board never sought to interpret section 3(b), but chose instead to request and be bound by an OLC opinion.

Further percolation in the courts of appeals prior to granting certiorari is unnecessary. The four decisions issued thus far provide four unique perspectives from the courts of appeals and sufficiently define the scope of the statutory construction issue to allow meaningful review by this Court. This same issue is pending in several other circuits, and the Eighth Circuit heard oral argument on the issue in *NLRB v. Whitesell Corp.*, 08-3291, on June 9, 2009.

Because sections 10(e) and 10(f) of the Act, 29 U.S.C. §§ 160(e), 160(f), authorize petitions for enforcement and review of Board decisions to be filed in the United States Court of Appeals for the D.C. Circuit, the split among the circuits is essentially nationwide in scope. The D.C. Circuit's decision in *Laurel Baye*, with which the Second Circuit's decision conflicts, affects, or potentially affects, Board decisions

arising out of unfair labor practice and representation cases in all states and judicial circuits.

Petitions for certiorari are currently pending in the Seventh Circuit case, *New Process Steel,* and in the First Circuit case, *Northeastern Land Services.* On July 15, 2009, the D.C. Circuit granted the Board's motion for a stay of the mandate until October 6, 2009, to allow the Board to decide whether it wishes to seek certiorari in *Laurel Baye.* On August 5, 2009, the Second Circuit granted a stay of its mandate in this case, pending the filing of this petition for certiorari. The issue is ripe for review and definitive resolution by the Court.

III. THE STATUTORY ISSUE IS OF IMMENSE SIGNIFICANCE AND HAS NEVER BEEN DECIDED BY THIS COURT

The Board has been issuing decisions with only two members since January 1, 2008. In its unopposed motion to stay the mandate in *Laurel Baye,* the Board advised the D.C. Circuit that it was considering filing a petition for certiorari on the two-member Board issue, and the Board acknowledged the significance of the issue, representing to the court:

> The certiorari petition, if filed, would present an issue that is important and recurring in the administration of the NLRA—whether the National Labor Relations Board can administer the NLRA, including issuing decisions in unfair labor practice cases—with only two sitting members, as it has been doing since January 1, 2008. Since that time, the Board has issued over 300 published decisions in unfair labor practice

> and representation cases, as well as numerous unpublished orders, and approximately 100 cases are pending in the courts of appeals.

(App. 55-56).

The Board further advised the D.C. Circuit that "[t]he authority of the two-member Board has been identified as an issue in 30 cases now in [the D.C. Circuit], including this one." (App. 56). Despite the D.C. Circuit's decision in *Laurel Baye,* the two-member Board is continuing to issue final decisions and orders. The President has nominated three new members to the Board, but the Senate has yet to act on those nominations. But even when new members are confirmed and the Board's ability to issue decisions and orders is no longer under a cloud, the statutory issue will remain immensely important, not only with regard to the more than 300 published (and numerous unpublished) decisions that have been issued by a two-member Board, but because the current situation is capable of repetition. Clarification from this Court is the only way the issue can be definitively decided.

The statutory construction issue is complicated because § 3(b) contains four separate provisions that must be construed harmoniously: (1) a delegation provision, (2) a vacancies provision, (3) a general quorum provision, and (4) a delegee group quorum provision. As is apparent from the decisions of the First, Second, Seventh, and D.C. Circuits, there are at least four, and perhaps more, approaches to the statutory construction issue. These courts have disagreed on whether the language of the statute is plain and, if so, what that plain meaning is, and they have disagreed on the significance and import of the

legislative history of the Act, the relevance of principal/agent law, and both whether deference is owed and the degree of any such deference.

The issue is further complicated by the unique circumstances underlying the Board's initial delegation of all powers to a three-member group effective December 28, 2007. There never was any intent that this three-member group would actually issue decisions and orders. And this is not a situation where the underlying case was already assigned to a three-member panel at the time that a vacancy occurred. Indeed, the case had not even reached the Board when the Board dropped to two members. The Board's acknowledged intent, which in practice it has achieved, was to have Members Schaumber and Liebman issue decisions and orders in all cases coming before the Board for what it knew—given the contentious political climate—was likely to be a lengthy, ongoing basis. The Board acknowledges that it could not accomplish this result directly, and serious questions exist as to whether this "sham" delegation is as commendable as the Second Circuit suggested, (App. 30), and whether the show must always go on. If the Second Circuit decision is allowed to stand, it reasonably can be anticipated that future political games will occur as the terms of Board members expire and changes in administration are imminent.

Petitioner contends that the D.C. Circuit's analysis in *Laurel Baye* is the most faithful to the statutory language and the intent of Congress, but no purpose would be served at this stage by analyzing the merits of the statutory construction issue. What can be said is that the courts of appeals have honest disagreements, the issue is highly significant and has

widespread effect, and the split among the circuits is not a tolerable one.

IV. THE SECOND CIRCUIT COMMITTED GRIEVOUS ERROR IN APPLYING CHEVRON DEFERENCE.

Review is also warranted because the Second Circuit grievously erred in deciding the case under *Chevron* deference principles. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court limited *Chevron* deference to situations where "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-227. The Court recognized that *Chevron* deference is most frequently applied when the agency charged with administering the statute in question has acted following "notice-and-comment rulemaking or formal adjudication." *Id.* at 230-231.

Here, there is no Board "interpretation" of the statute to which this Court could defer under *Chevron*. Even Justice Scalia, a frequent critic of *Mead*, has recognized that *Chevron* deference is inappropriate when "no interpretation has been made by personnel of the agency responsible for administering the statute." *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in judgment). The Board did not undertake to make, formally or otherwise, its own independent determination as to the meaning of § 3(b). This issue was never litigated in any formal Board proceeding, nor did the Board engage in formal rulemaking. Instead, the Board sought an opinion from the OLC

and the Board agreed to be "bound" by that determination. Thus, it is the opinion of OLC, not the Board, to which the Second Circuit deferred. This was plain error.

That *Chevron* deference was inappropriate is evident from the Board's failure to suggest at any time before the Second Circuit, either in its brief or in oral argument, that deference under *Chevron* was appropriate. Indeed, the Board did not contend that deference of any type, even the more limited deference applied by the Court to more informal agency interpretations in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), was appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 08-3822-ag (L), 08-4336-ag (XAP)

August Term 2008

(Argued: April 15, 2009 Decided: June 17, 2009)

SNELL ISLAND SNF LLC, d/b/a SHORE ACRES REHABILITATION AND NURSING CENTER, LLC, and HGOP, LLC, d/b/a CAMBRIDGE QUALITY CARE, LLC,	)
Petitioners-Cross-Respondents,	)
-v.-	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent-Cross-Petitioner.	)

Before: WINTER, CABRANES, and SACK, *Circuit Judges*.

Petitioners—two companies whose employees had recently voted to join a labor union—seek review of an order of the National Labor Relations Board ("NLRB" or the "Board"), which concluded that petitioners had violated various provisions of the National Labor

Relations Act, 29 U.S.C. § 151 *et seq.* (the "Act"), by refusing to recognize and bargain with the United Food and Commercial Workers Union, Local 1625. The Board had previously certified a vote by petitioners' employees in favor of union representation. Petitioners argue that, in each instance, the Board acted through an unlawfully constituted panel of only two members, because the Act requires that panels of the Board contain a minimum of three members, with two members necessary for a quorum. We hold that the panel in this case was a lawfully convened panel of three members, and that the panel continued to operate in accordance with the Act after one of its members ceased to serve on the Board, because there remained a quorum of two members. We also hold that the decision by a regional director of the NLRB to overrule petitioners' objections to the union election without holding a hearing was not an "abuse of discretion."

The petition for review is DENIED. The cross-application of the NLRB for enforcement is GRANTED.

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Englehart, Supervisory Attorney, and David A. Seid, Attorney, *on the brief*), National Labor Relations Board, Washington, D.C., *for Respondent-Cross-Petitioner*.

JOSÉ A. CABRANES, *Circuit Judge*:

We consider two questions arising from a labor dispute adjudicated before a panel of the National Labor Relations Board ("NLRB" or the "Board"): (1) whether an adjudication by a two-member panel of the NLRB is permitted under Section 3(b) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the "Act"), where a third member of the panel was disqualified because his term had expired and the total membership of the NLRB was only two members; and (2) whether it was an "abuse of discretion" for a regional director of the NLRB to overrule an employer's objections to a union election without holding a hearing or interviewing witnesses.

BACKGROUND

The following facts are not in dispute. *See generally Snell Island SNF LLC*, 352 NLRB No. 106, at 2-3 (2008). The NLRB is the administrative agency of the United States responsible for overseeing labor-union elections and adjudicating certain types of labor disputes. It consists of five members, each of whom is appointed by the President, with the advice and consent of the Senate, for a term of five years. *See* 29 U.S.C. § 153(a) (providing further that "[t]he President shall designate one member to serve as Chairman of the Board"). In the ordinary course, the NLRB hears and decides cases by panels of three members in

accordance with section 3(b) of the Act, which provides that the NLRB

> is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b).[1]

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[1] The National Labor Relations Act—which is also known as the "Wagner Act" after its sponsor, Senator Robert F. Wagner of New York, *see The Encyclopedia of New York City* 1231 (Kenneth T. Jackson ed., 1995)—was enacted and took effect in 1935. *See generally* Lawrence M. Friedman, *American Law in the 20th Century* 167-69 (2002) (describing the reception of the Act by business and labor interests and its effect on commerce and politics in the New Deal, Second World War, and post-war years). The Act, which was among the first New Deal regulations to be upheld by the Supreme Court, *see NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority."), originally created a three-member Board, with two members necessary for a quorum, *see* Pub. L. No. 74-198, § 3(a), 49 Stat. 449, 451 (1935) ("There is hereby created a board . . . which shall be composed of three members . . . ."); *id.* § 3(b) ("A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum."). In 1947, Congress passed the Labor Management Relations Act, which expanded the membership of the Board to five and created the panel system used today. *See*

At the beginning of December 2007, the NLRB consisted of four members—Wilma B. Liebman, Peter C. Schaumber, Peter N. Kirsanow, and Dennis P. Walsh—whose terms were staggered. One seat was vacant, and the terms of Kirsanow and Walsh were set to expire on December 31, 2007. Anticipating that no replacement appointments were forthcoming, and that it would lose its three-member quorum, the Board delegated all of its powers to a three-member panel consisting of Liebman, Schaumber, and Kirsanow, effective December 28, 2007. In reaching this decision, which the Board memorialized in a December 20, 2007, Minute of Board Action, the Board relied on the plain language of the Act and also

> relied on . . . the March 4, 2003 opinion issued by the Office of Legal Counsel of the U.S. Department of Justice (OLC) in response to the Board's May 16, 2002 request for OLC's opinion whether the Board may issue decisions during periods when three or more of the five seats on the Board are vacant. OLC's opinion concluded that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." . . .
>
> OLC's opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board's discretion whether or not to exercise that authority.

Pub. L. No. 80-101, §§ 3(a)-(b), 61 Stat. 136, 139 (1947) ("Taft-Hartley Act" or "Taft-Hartley amendments").

Addendum to J.A. 2 ("Minute of Board Action," Dec. 20, 2007, at 2); *see also* M. Edward Whelan, III, Quorum Requirements: Memorandum Opinion for the Solicitor, National Labor Relations Board 2 (Mar. 4, 2003), *available at* http://www.usdoj.gov/olc/2003/nlrb_quorum_03042003.pdf (last visited June 11, 2009) (on file with Clerk of Court) ("OLC Opinion"). When Kirsanow's term expired on December 31, the panel continued to operate in the normal course with a two-member quorum consisting of Liebman and Schaumber. As of the filing of this opinion, Liebman and Schaumber remain the only two members of the Board.

Petitioner Snell Island SNF LLC operates a nursing home and long-term care facility in St. Petersburg, Florida, called "Shore Acres." Petitioner HGOP, LLC, provides employee-staffing services to the Shore Acres facility and other nursing homes, and has its principal place of business in Brooklyn, New York. *See Snell Island SNF LLC*, 352 NLRB No. 106, at 1. Petitioners are joint employers of the employees of Shore Acres.

On December 12, 2007, at a representative election held under the auspices of the NLRB, *see* 29 U.S.C. § 159, employees at Shore Acres elected United Food and Commercial Workers Union, Local 1625 (the "Union"), as their exclusive collective-bargaining representative. Petitioners promptly filed with the NLRB thirteen objections to the election. A regional director of the NLRB reviewed the objections[2] and

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[2] The NLRB is authorized by statute "to delegate to its regional directors its powers . . . to determine the unit appropriate for the

recommended in January 2008 that they be overruled in their entirety. Petitioners filed exceptions to the regional director's recommendation and on March 13, 2008, a two- member panel of the Board—consisting of Liebman and Schaumber—overruled the exceptions and issued an unpublished Decision and Certification of Representative. Footnote 1 to that decision explained the number and selection of the panel members:

> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. *See* Sec. 3(b) of the Act.

J.A. 71.

Following the March 13 Decision and Certification, petitioners refused to recognize and bargain with the

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purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof . . . ." 29 U.S.C. § 153(b); *see also* 29 C.F.R. § 102.69(a) ("Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending.").

Union.[3] On May 16, 2008, the Union filed an unfair labor practice claim with the NLRB, which was referred to the regional director and ultimately adjudicated by the same two-member panel of the Board. On July 18, 2008, the two-member panel issued a Decision and Order concluding that petitioners had engaged in unfair labor practices by refusing to negotiate with the Union and ordering petitioners to meet with the Union. *See Snell Island SNF LLC*, 352 NLRB No. 106, at 2-3. The July 18 Decision and Order contained a footnote substantially similar to footnote 1 in the March 13 Decision and Order but indicating that President Bush had, in the interim, designated Schaumber as Chairman.

This appeal followed. Before this Court, petitioners argue principally that the July 18 and March 13 Decisions and Orders were not issued by a properly constituted panel of the NLRB because only two Board members participated in the adjudication. In the alternative, petitioners contend that the NLRB abused its discretion with respect to two of petitioners' thirteen objections to the union election, which objections petitioners argue should not have been overruled without interviewing witnesses or

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[3] Petitioners stated to the NLRB that "they are refusing to bargain in this case in order to secure judicial review of the certification [of the union election] issued by the Board." J.A. 85 (Resp'ts' Answer to Compl., Feb. 15, 2008, ¶ 13). *See Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 159 n.2 (2d Cir. 1981) ("Certification decisions are not 'final orders' under §§ 10(e) and (f) of the NLRA, and are therefore not judicially reviewable. Instead, to obtain judicial review, aggrieved employers can refuse to bargain with certified representatives, thus subjecting themselves to unfair labor practice proceedings." (citations omitted)).

conducting an evidentiary hearing. The NLRB has filed a cross-application for enforcement of its July 18 Decision and Order.

DISCUSSION

I. Jurisdiction

We have jurisdiction to review final orders of the NLRB pursuant to section 10(f) of the Act. *See* 29 U.S.C. § 160(f) ("Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business . . . ."). As we have previously explained, to obtain judicial review of a union's certification by the Board, an employer must refuse to bargain, prompting an unfair labor practice finding—a final order that we may review. *See NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 n.5 (2d Cir. 1994). Accordingly, we consider in this appeal both the March 13 Decision and Order (certifying a union election), and the July 18 Decision and Order (finding an unfair labor practice). *See* 29 U.S.C. § 159(d) ("Whenever an order of the Board . . . is based in whole or in part upon facts certified following an investigation [of a union election] and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record . . . and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part of the order of the Board shall be made and entered upon the

pleadings, testimony, and proceedings set forth in such transcript.").

II. Quorum Requirement

Petitioners contend that the NLRB issued its March 13 and July 18 Decisions and Orders without statutory authority because only two Board members participated in those adjudications. According to petitioners, section 3(b) of the Act requires that a panel of the Board consist of at least three members. Petitioners acknowledge that once a three-member panel is duly constituted, the panel may continue if one member should become unavailable so long as there remains a quorum of two members. However, petitioners argue that the NLRB never effectively constituted a three-member panel in this case because "[t]here never was any intent that th[e] three-member group [consisting of Liebman, Schaumber, and Kirsanow] would actually issue decisions and orders." Petitioners' Br. at 19. Instead, because "Kirsanow's term was set to expire in three days, . . . the Board knew he would not be around to exercise the powers being delegated." *Id.* Therefore, petitioners conclude that the December 28, 2007, delegation of all powers to the three-member panel of Liebman, Schaumber, and Kirsanow was "an acknowledged *sham*." *Id.* (emphasis added).

A. Standard of Review

Petitioners argue that our review of the NLRB's "power or jurisdiction" is "plenary and de novo." Petitioners' Br. at 14 (citing *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983)). We note that the cited passage of *Railroad*

Yardmasters does not discuss a standard of review at all; instead, it discusses whether a question regarding an agency's "power or jurisdiction" that was not raised in an administrative proceeding was waived in a court proceeding, 721 F.2d at 1338. In any event, *Railroad Yardmasters* was decided before the Supreme Court's landmark decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which established a two-step process for reviewing statutes that govern federal agencies. Our Court has recently explained the *Chevron* standard of review as follows:

> At step one, we consider whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. To ascertain Congress's intent, we begin with the statutory text because if its language is unambiguous, no further inquiry is necessary. Only if we determine that Congress has not directly addressed the precise question at issue will we turn to canons of construction and, if that is unsuccessful, to legislative history to see if those interpretative clues permit us to identify Congress's clear intent.
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> If, despite these efforts, we still cannot conclude that Congress has directly addressed the precise question at issue, we will proceed to *Chevron* step two, which instructs us to defer to an agency's interpretation of the statute it administers, so long as it is reasonable.

N.Y. State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Servs. Admin. for Children & Families, 556 F.3d 90, 97 (2d Cir. 2009) (citations and internal quotation marks omitted). We apply the two-pronged *Chevron* analysis even where, as here, the question presented involves an agency's jurisdiction or power to act. *See Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 380-81 (1988) (Scalia, J., concurring) (collecting cases and noting that "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) ("[T]he Court of Appeals was incorrect to state on the facts of this case that the [agency's] expertise was not deserving of deference because of the 'statutory interpretation-jurisdictional' nature of the question at issue. An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference." (citation and internal quotation marks omitted)); *Mathirampuzha v. Potter*, 548 F.3d 70, 82 (2d Cir. 2008) ("[W]e defer to agencies' reasonable interpretations of ambiguous language in the statutes they administer, including the scope of those statutes and the types of claims they cover." (citing *Chevron*, 467 U.S. at 844)); *Nutritional Health Alliance v. FDA*, 318 F.3d 92, 97 (2d Cir. 2003) ("When an administrative agency asserts jurisdiction to regulate a particular subject matter of public concern based on its construction of a statute that it administers, our analysis is governed by *Chevron* . . . ." (footnote omitted)); *Connecticut ex rel. Blumenthal v.*

U.S. Dep't of the Interior, 228 F.3d 82, 93 (2d Cir. 2000) (rejecting an argument that "*Chevron* deference is inappropriate . . . because less deference is owed to agency determinations that expand an agency's jurisdiction").[4]

B. Other Circuits

Ours is not the only court to consider the question of the NLRB's quorum requirement. The United States Court of Appeals for the First Circuit recently confronted the same question in *Northeastern Land Servs., Ltd. v. NLRB*, __ F.3d __, No. 08-1878, 2009 U.S. App. LEXIS 5267 (1st Cir. Mar. 13, 2009), and concluded that "[t]he Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)," *id.* at *12-13. After reviewing the text of section 3(b) of the Act, the First Circuit reasoned that

> First, section 3(b) allowed the Board to delegate all of its powers to a three-member group.

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[4] Even before *Chevron* was decided, the Supreme Court afforded deferential treatment to the NLRB's interpretation of the scope of its powers under the Act. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984) ("Respondent argues that because the scope of the 'concerted activities' clause in Section 7 [of the Act] is essentially a *jurisdictional or legal question* concerning the coverage of the Act, we need not defer to the expertise of the Board. We have never, however, held that such an exception exists to the normal standard of review of Board interpretations of the Act; indeed, we have not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here." (emphasis added; citation and internal quotation marks omitted)).

> Second, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." The vacancy, which left the two-member quorum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board.

Id. at *13 (quoting 29 U.S.C. § 153(b)) (second alteration in original). The First Circuit also acknowledged that the OLC Opinion recommended the same result, and posited that "any other general rule would impose an undue burden on the administrative process." *Id.* (internal quotation marks and alteration omitted). Finally, the First Circuit recognized that "courts have upheld analogous approaches by other administrative agencies," including the Securities and Exchange Commission and the National Mediation Board, seeking to continue to operate when confronting vacancies. *Id.* at *15 (collecting cases).

After the instant case was argued, two other courts of appeals issued relevant decisions. In *New Process Steel, L.P. v. NLRB*, __ F.3d __, No. 08-3517, 2009 U.S. App. LEXIS 9440 (7th Cir. May 1, 2009), the United States Court of Appeals for the Seventh Circuit concluded that a two-member panel of the NLRB—the same panel that adjudicated the instant case—"had authority to hear the labor dispute," *id.* at *21. In the Seventh Circuit's view, the "plain meaning" of section 3(b) of the Act "supports the NLRB's delegation procedure":

> [T]he vacancy of one member of a three[-]member panel does not impede the right

> of the remaining two members to execute the full delegated powers of the NLRB. As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy.

Id. at *12.

Having concluded that the two-member panel had jurisdiction under the "plain meaning" of the Act, the Seventh Circuit nonetheless commented on its legislative history. *See id.* at *15 ("When the plain meaning of a statute is unambiguous, we need not consider a statute's legislative history or analogous cases in order to interpret it. However, we also take time to note that the legislative history behind § 3(b) does not support New Process' reading of the statute." (citation omitted)). Specifically, the court discussed the history of the Taft-Hartley amendments of 1947, which expanded the NLRB's membership from three to five. *See id.* at *16-17 (citing, *inter alia*, S. Rep. No. 80-105, at 8 (1947) ("There is no field in which time is more important, yet the Board is from 12 to 18 months behind in its docket. . . . The expansion of the Board from three to seven members,[5] which this bill proposes,

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[5] As the Seventh Circuit explained, the membership of the Board was ultimately expanded to five members, rather than seven, as the Senate bill proposed:

> The House version created a Labor-Management Relations Board of three members whose sole duty was to decide cases. H.R. Rep. No. 80-245, at 25 (1947). The Senate version expanded the size of the NLRB from three members to seven but included the delegation and

would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage . . . ."), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 407, 414 (1948) (hereinafter "*Leg. Hist.*")). In the Seventh Circuit's view, "[t]he purpose of the [Taft-Hartley] revisions . . . was to allow the NLRB to hear *more* cases by creating panels of the entire Board." *New Process Steel*, 2009 U.S. App. LEXIS 9440, at *17 (emphasis added); *accord Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981) ("Section 3(b) of the NLRA authorizes the Board 'to delegate to any group of three or more members any or all of the powers which it may itself exercise.' Congress added this provision to the NLRA to enable the Board to handle an increasing caseload more efficiently." (citation omitted)). In light of the legislative history of the Taft-Hartley amendments, the Seventh Circuit concluded that "a court interpreting the statute [to restrict the NLRB from acting when its membership falls below a certain level] would hinder the efficient panel operation that Congress intended to create." *New Process Steel*, 2009 U.S. App. LEXIS 9440, at *17.

On the same day that the Seventh Circuit decided *New Process Steel*, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") reached a different conclusion in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, __ F.3d __,

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quorum provisions. S. Rep. [No.] 80-105, at 19 (1947). The eventual bill, which expanded the NLRB to five members, was a compromise between the two versions.

New Process Steel, 2009 U.S. App. LEXIS 9440, at *16.

No. 08-1214, 2009 U.S. App. LEXIS 9419 (D.C. Cir. May 1, 2009). Relying principally on the "at all times" requirement for Board quorum, *see* 29 U.S.C. § 153(b) ("A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, *at all times*, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." (emphasis added)), the D.C. Circuit concluded that "a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, 'at all times,' satisfied." *Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *9. In the D.C. Circuit's view, whenever the Board loses jurisdiction because of a loss of quorum, so too do any panels of the Board lose jurisdiction, regardless of whether the panels retain a quorum.

The D.C. Circuit considered and rejected the NLRB's argument that the "except that" clause was an exception to the "at all times" requirement. *See* 29 U.S.C. § 153(b) ("[T]hree members of the Board shall, *at all times*, constitute a quorum of the Board, *except that* two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." (emphases added)). In the D.C. Circuit's view, "Congress's use of differing object nouns ['quorum of the Board' *versus* 'quorum of any group'] within the two quorum provisions indicates clearly that each quorum provision is independent from the other." *Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *10. Accordingly, the D.C. Circuit concluded that "[t]he delegee group quorum provision does not eliminate [the Board's quorum] requirement," *id.* at

*11, nor does it permit the two-member panel to "circumvent the statutory Board quorum requirement," *id.* at *9.

The D.C. Circuit did not discuss the legislative history of the Taft-Hartley amendments, but instead included a discussion of agency law (meaning "principal-agent" law, not the law of administrative agencies), which—in that court's view—applied to the delegation of full powers from a board to a committee or subgroup of a board. According to the D.C. Circuit, "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." *Id.* at *11 (citing the Restatement (Third) of Agency § 3.07(4) (2006) ("When a principal that is not an individual ceases to exist or commences a process that will lead to cessation of its existence or when its powers are suspended, the agent's actual authority terminates except as provided by law.")). Because "the delegee committee does not act on its own behalf[,] [but on] . . . that of the Board," where a Board loses its authority, so do its committees. *Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *12.

To summarize, one of our sister circuits—the Seventh Circuit—has upheld a decision by the two-member NLRB panel based on the "plain meaning" of section 3(b) of the Act, noting that its interpretation comports with the legislative history of relevant amendments to the Act, without discussing principles of agency (*i.e.* principal-agent) law. *New Process Steel*, 2009 U.S. App. LEXIS 9440, at *11-12. Another of our sister circuits—the D.C. Circuit—has overturned a decision by the same two-member panel based on the plain language of section 3(b) of the Act,

noting that its interpretation comports with applicable principles of agency law, but without discussing the applicable legislative history. *See Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *9. A third sister circuit—the First Circuit—has concluded that the "plain text" of the Act authorized the decisions by the same two-member panel, without discussing either the legislative history of the statute or relevant principles of agency law. *Northeastern Land Servs.*, 2009 U.S. App. LEXIS 5267, at *13.

The question regarding the jurisdiction of the NLRB's two-member panel is one ultimately to be resolved by the Supreme Court. In the meantime, we must make a determination in the present case.

C. The NLRB Panel Was Duly Constituted in the First Instance

We first consider petitioner's argument that the NLRB panel was not duly constituted in the first instance because the delegation to a panel plenipotentiary was a "sham," Petitioners' Br. at 19, and begin our analysis with the statute itself, as our sister circuits have done. Section 3(b) of the Act provides that the NLRB

> is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute

> a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b).

Here, we agree with the First Circuit that, in light of the text of the statute, which expressly authorizes the NLRB "to delegate to any group of three or more members any or all of the powers which it may itself exercise," *id.*, the delegation to a panel plenipotentiary was within the NLRB's authority. *See Northeastern Land Servs.*, 2009 U.S. App. LEXIS 5267, at *13 ("[S]ection 3(b) allowed the Board to delegate all of its powers to a three-member group."). That the NLRB knew that the membership of the panel would soon be reduced from three to two—and that Board's membership would also decrease to two—has no bearing on the fact that the panel was lawfully constituted in the first instance.

Petitioners argue that *Northeastern Land Services* is unpersuasive because the First Circuit did not discuss in that decision the relevance of 28 U.S.C. § 46, which sets the requirements for service on a three-member panel of a federal court of appeals. *See* Letter of Charles P. Roberts, III, counsel for Snell Island, April 3, 2009, at 1. As petitioners note, the Supreme Court has interpreted 28 U.S.C. § 46 to "require[ ] the inclusion of at least three [Article III] judges in the first instance," *Nguyen v. United States*, 539 U.S. 69, 82 (2003), as a prerequisite to any valid decision by a quorum, *see* 28 U.S.C. § 46(d). We agree with petitioners that, like a three-member panel of a federal court of appeals, a three-member panel of the NLRB must be duly constituted "in the first instance," *Nguyen*, 539 U.S. at 82, before the action of a quorum

of the panel is valid. In the instant case, we agree with the First Circuit that the three-member panel of the NLRB that took effect on December 28, 2007, was duly constituted. *See Northeastern Land Servs.*, 2009 U.S. App. LEXIS 5267 at *12-13.

D. The NLRB Panel Retained Jurisdiction When the Board Lost Its Quorum

The more difficult question is whether the NLRB panel lost its authority once the NLRB as a whole lost its quorum. As required under *Chevron*, we consider first "'whether Congress has directly spoken to the precise question at issue.'" *N.Y. State Office of Children & Family Servs.*, 556 F.3d at 97 (quoting *Chevron*, 467 U.S. at 842). On this point, two of our sister circuits disagree over the "plain meaning" of section 3(b) of the Act. *Compare New Process Steel*, 2009 U.S. App. LEXIS 9440, at *12 ("As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy.") *with Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *12 ("Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, 'at all times,' satisfied."). At the very least, this split suggests that the statute is ambiguous regarding the enduring or residual powers of an NLRB panel once the Board has lost a quorum.

In our view, nothing in the statute itself explains what happens to a duly constituted *panel* of the NLRB when the *Board* itself loses its quorum. Accordingly,

since the statute is silent on the precise question, "we turn to canons of construction and, if that is unsuccessful, to legislative history to see if those interpretative clues permit us to identify Congress's clear intent." *N.Y. State Office of Children & Family Servs*, 556 F.3d at 97 (internal quotation marks omitted).

The canons of statutory construction do not shed any light on Congress's intent in the circumstances presented in the instant case. The D.C. Circuit, relying on "[a] cardinal principle of interpretation . . . that no provision is rendered inoperative or superfluous, void or insignificant," *Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *8 (internal quotation marks omitted), held that "the Board quorum requirement must be satisfied '*at all times*,'" *id.* (quoting 29 U.S.C. § 153(b)). We agree with this portion of the D.C. Circuit's analysis. *See Filler v. Hanvit Bank*, 378 F.3d 213, 220 (2d Cir. 2004) (citing with approval *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995), for the proposition that courts should avoid interpretations of statutes that "render statutory language surplusage"). However, the application of this "cardinal principle of interpretation" does not answer the precise question presented here: once the Board has lost its quorum, what happens to a panel that was duly constituted before the Board lost its quorum? To answer this question, the D.C. Circuit relied on "basic tenets of agency and corporation law." *Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *11 (citing, *inter alia*, Restatement (Third) of Agency § 3.07(4) (2006)). In the view of the D.C. Circuit, "[a]n agent's delegated authority is . . . deemed to cease upon the resignation or termination of the delegating authority," *id.*, so that "[i]f the Board has no

authority, it follows that the [panel] has none," *id.* at *12.

Our Court's precedents, however, require us to turn to legislative history instead of considering related fields of law—as the D.C. Circuit did in consulting agency and corporation law—in the event that ordinary canons of statutory interpretation are unhelpful. *See N.Y. State Office of Children & Family Servs.*, 556 F.3d at 97. Our survey of the legislative history of the Taft-Hartley Act, which created the NLRB's panel system, reveals that the broad animating purpose of the legislation was "to equalize the balance of power between employers and employees" in response to the "widespread feeling that the unions had gotten too much power during the Roosevelt years." Lawrence M. Friedman, *American Law in the 20th Century* 189 (2002). Among other things, the Taft-Hartley amendments outlawed "closed shops" and secondary boycotts, permitted employers to sue unions for breach of contract, and—in the words of Senator Robert A. Taft of Ohio, the Chairman of the Senate Committee of Labor and Public Welfare—"entirely rewr[ote] the Wagner Act." 93 Cong. Rec. 3753, 3786 (Apr. 17, 1947), *reprinted in* 2 NLRB, *Leg. Hist.* 1000, 1000.

In light of the sweeping nature of the Taft-Hartley amendments and their focus on the balance of power in dealings with organized labor, it is surprising that the reforms to the structure of the NLRB received relatively little attention in the legislative history. Senator Taft explained in his floor remarks that the purpose of increasing the NLRB's membership was to enable the Board to "accomplish twice as much in the way of the number of hearings held." 93 Cong. Rec.

3950, 3953 (Apr. 23, 1947), *reprinted in* 2 NLRB, *Leg. Hist.* 1005, 1011. This was particularly important because "the Board [was] behind in its work, and [the Taft-Hartley amendments would] impose a considerably greater volume of work upon the Board." *Id.*[6]

In light of Senator Taft's remarks, we have previously observed that "Section 3(b) of the NLRA authorizes the Board 'to delegate to any group of three or more members any or all of the powers which it may itself exercise.' Congress added this provision to the NLRA to enable the Board to handle an increasing caseload more efficiently." *Hall-Brooke Hosp.*, 645 F.2d at 162 n.6 (citation omitted)). In *Hall-Brooke Hospital*, we also examined a report by the Senate Committee on Labor and Public Welfare, which concluded that "[t]here is no field in which time is more important, yet the Board is from 12 to 18 months behind in its docket. . . . The expansion of the Board . . . would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage . . . ." S. Rep. No. 80-105, at 8 (1947), *reprinted in* 1 NLRB, *Leg. Hist.* 407, 414; *see also New Process Steel*, 2009 U.S. App.

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[6] Some opponents of the Taft-Hartley Act, including Senator Wayne L. Morse of Oregon, also acknowledged that the purpose of expanding the membership of the Board was to enable the Board to increase its efficiency. *See* 93 Cong. Rec. 6593, 6614 (June 5, 1947) ("So I think it is very important that we have a seven-man board, rather than a five-man board, because I wish to see two departments, composed of three men each, sitting day after day and week after week in the hearings held by the board, in order to keep the board up to date in respect to its docket."), *reprinted in* 2 NLRB, *Leg. Hist.* 1526, 1562.

LEXIS 9440, at *16-17 (considering the Senate Report and concluding that "Congress['s] . . . primary concern was increasing the efficiency of the Board. . . . The purpose of the [Taft-Hartley] revisions . . . was to allow the NLRB to hear more cases by creating panels of the entire Board.").[7]

In addition to the legislative history described in *Hall-Brooke Hospital*, the NLRB argues that prior to the Taft-Hartley amendments of 1947, the Board consisted of three members, two of whom were required for a quorum. *See* Resp't Br. 16; *see also* Pub. L. No. 74-198 § 3(a), 49 Stat. 449, 451 (1935) ("There is hereby created a board . . . which shall be composed of three members . . . ."); *id.* § 3(b) ("A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum."). As the NLRB notes, "Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued hundreds of decisions with only two of its three seats filled." Resp't Br. 16. Specifically,

> From 1935 to 1947, the original Board issued 466 decisions during three discrete periods when it had only two seated members. First,

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[7] The House Report did not discuss an expansion of the Board's membership. *See* H.R. Rep. No. 80-245, at 25 (1947), *reprinted in* 1 NLRB, *Leg. Hist.* 292, 316. The House Conference Report noted the differences between the House and Senate bills, and concluded simply that "[t]he conference agreement . . . retains the existing Board but increases its membership to five," without commenting on the purpose of the amendment. H.R. Rep. No. 80-510, at 37 (1947) (Conf. Rep.), *reprinted in* 1 NLRB, *Leg. Hist.* 505, 541.

> from August 27 through October 11, 1941, the two-member Board issued 224 decisions. Second, from August 27 to November 26, 1940, a two-member Board issued 239 decisions. Third, from August 31 to September 23, 1936, a two-member Board issued three decisions.

Resp't Br. at 16-17 n.8 (citations omitted).

In our view it is significant, in light of the established history of operating with only two members, that Congress continued to allow only two Board members (a quorum of an NLRB panel) to issue labor decisions. While increasing the size of the Board from three members to five members, Congress left undisturbed the two-member quorum requirement for panels of the Board. Moreover, as the NLRB observes, "the Senate [version of the] bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers 'to any group of three or more members,' two of whom would be a quorum." Resp't Br. 17 (quoting S. 1126, § 3(b) (1947), *reprinted in* 1 NLRB, *Leg. Hist.* 107). *See ante* n.5 (describing the House and Senate versions of the Taft-Hartley amendments).

However, while this history seems to support the Board's reading of the Act, it does not definitively answer the precise question at issue in the instant case—whether, in the name of efficiency, a panel of the Board may continue to operate once the Board itself loses its quorum. The only reference to this precise question comes from the floor remarks of Senator Joseph C. O'Mahoney of Wyoming, in which he

opposed overriding President Truman's veto of the Taft-Hartley Act.

> Observe that the Board is given complete and plenary power to delegate any or all of its power to any group of three; and then any two members of that group of three can speak for the Board. So we have a bill—and I invite the attention of lawyers in this body to this—which not only authorizes the Board to delegate its powers, but authorizes the Board to delegate its powers, and all of them, *to less than a quorum of the Board*. This we do in the name of reducing government in Washington. This we do in the name of returning control of the economic life of the people of the United States to the people of the United States; and we undertake a program of delegated powers which, so far as I know, has never been suggested before in the history of this Government.

93 Cong. Rec. 7677, 7679 (June 23, 1947) (emphasis added), *reprinted in* 2 NLRB, *Leg. Hist.* 1629, 1632. However, Senator O'Mahoney did not raise this objection in his earlier floor statements concerning section 3 on May 6 and May 12, 1947, *see* 2 NLRB, *Leg. Hist.* 1263, 1467, and none of the other Senators—including Senator Taft—responded to Senator O'Mahoney's pointed criticism of the panel quorum requirement in the debate that followed prior to a vote to override the President's veto on the same day.

We are reluctant to draw much significance from a lone remark by a single senator opposing a bill, made after the Taft-Hartley Act initially passed and only

just before the Senate voted to override President Truman's veto. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, *J.*, concurring) (arguing in favor of limiting "legislative history" to "Committee reports" because "to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions"). Without more, we are unable to conclude that delegation to less than a quorum of the Board was an intended or unintended consequence of the Taft-Hartley amendments.

In short, we draw two conclusions about the quorum requirement in section 3(b) of the Act from this discussion of the legislative history of the Taft-Hartley amendments. First, Congress restructured the NLRB to enable it to resolve more disputes, not fewer. As a result, we adhere to our prior observation that one of the purposes of the Taft-Hartley amendments was to increase the NLRB's efficiency. *See Hall-Brooke Hosp.*, 645 F.2d at 162 n.6; *see also New Process Steel*, 2009 U.S. App. LEXIS 9440, at *18 ("To the extent that the legislative history points either way . . . it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently.").[8] Second, the legislative

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[8] We are mindful that vacancies on the governing boards of "independent" federal agencies are filled by presidential nominations with the advice and consent of the Senate, and delays are a common occurrence. Courts have generally been sympathetic to a federal agency's efforts to continue to operate in the face of vacancies, and have interpreted quorum requirements

history of the Taft-Hartley amendments lacks any clear statement of intent regarding the jurisdiction of a plenipotentiary panel where the Board loses its quorum—the precise question that we face in this case. Where the legislative history touches on the precise question, in Senator O'Mahoney's floor remarks, Congressional intent is unclear. "If . . . we . . . cannot conclude that Congress has *directly* addressed the *precise* question at issue, we will proceed to *Chevron* step two, which instructs us to defer to an agency's interpretation of the statute it administers, so long as it is reasonable." *N.Y. State Office of Children & Family Servs.*, 556 F.3d at 97 (emphases added; internal quotation marks omitted); *see also Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007) (observing that, when a statute is ambiguous, a court "look[s] to structure, purpose, and history to determine whether these construction devices can convincingly resolve the ambiguity at *Chevron* step one," and that "[a] high level of clarity is necessary to resolve textual ambiguity in this manner" (internal quotation marks omitted)). Accordingly, we examine with appropriate deference the NLRB's interpretation of the Act's quorum requirement.

The NLRB's interpretation of the Act is straightforward. The Act expressly permits the NLRB to delegate all or part of its powers to a three-member panel, for which two members constitute a quorum. *See* 29 U.S.C. § 153(b). Although the Act does not expressly provide that a panel retains jurisdiction where the Board loses its quorum, neither does the Act

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to permit an agency to function. *See Northeastern Land Servs.*, 2009 U.S. App. LEXIS 5267, at *15 (collecting cases).

state that the panel loses jurisdiction in such circumstances. In light of the animating purpose of the Taft-Hartley amendments at issue here, which permitted the NLRB to continue to operate in panels of as few as two members in order to increase the Board's overall efficiency, the NLRB interprets the Act as permitting the two remaining members of the Board to issue labor decisions despite the Board's lack of a quorum.

In our view, this is a reasonable interpretation of the statute. Indeed, we commend the NLRB for its conscientious efforts to stay "open for business" in the face of vacancies that it did not create and for which it lacked the authority to fill. Of course, the D.C. Circuit's view that where a Board loses its authority, so does its panels, *see Laurel Baye Healthcare*, 2009 U.S. App. LEXIS 9419, at *12, is also a reasonable interpretation of the Act. However, in applying *Chevron* deference, an agency's "view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, __ U.S. __, 129 S. Ct. 1498, 1505 (2009) (emphasis omitted). Accordingly, we hold that the NLRB panel in this case was a lawfully convened panel of three members. Because of the existence of a two-member quorum, the panel continued to operate in accordance with section 3(b) of the Act after one of its members ceased to serve on the Board and even though the Board itself lost a quorum.

III. Regional Director's Certification

Petitioners' remaining claim—that the NLRB's regional director should not have certified the union election in this case without first holding a pre-certification hearing and interviewing witnesses—is without merit. We review such objections under a deferential "abuse of discretion" standard. *See, e.g.*, *NLRB v. HeartShare Human Servs. of N.Y., Inc.*, 108 F.3d 467, 470 (2d Cir. 1997) ("Congress has given the NLRB broad discretion in the conduct and supervision of representation elections, and consequently the Board's decision earns considerable deference. Our review is limited to determining whether the Board reasonably exercised its discretion." (citation omitted)); *Arthur Sarnow Candy Co.*, 40 F.3d at 556 ("'[T]he conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.'" (quoting *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970) (Friendly, *J.*))); *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1312 (2d Cir. 1990) ("[A] party seeking to set aside an election has the heavy burden of establishing that the Board abused its discretion in certifying the election." (internal quotation marks omitted)); *cf. Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) ("A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." (citation, alterations, and internal quotation marks omitted)).

A pre-certification hearing before an NLRB regional director regarding objections to a union election is not required by federal regulation unless the challenging party "raise[s] substantial and material factual issues." 29 C.F.R. § 102.69(d) ("In issuing a report on objections or challenged ballots, or both, . . . or in issuing a decision on objections or challenged ballots, or both, . . . the regional director *may* act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing *shall* be conducted with respect to those objections or challenges which the regional director concludes raise substantial and material factual issues." (emphasis added)); *see also NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 891 (2d Cir. 1983) ("[A] party is entitled to have a hearing only if it demonstrates by *prima facie* evidence the existence of substantial and material factual issues which if resolved in its favor, would require the setting aside of the representation election." (internal quotation marks omitted)).

In the instant case, petitioners were afforded an opportunity to submit "[a]ffidavits, signed statements, documents or other appropriate material which constitutes prima facie evidence of each of the filed objections" to the NLRB regional director. J.A. 28. The regional director reviewed petitioners' proffered evidence, including a letter from petitioners stating that at least two employees would testify that several co-workers told them prior to the union election that "if they were going to vote 'No' it would be best for them not to vote at all," J.A. 40 (Report on Objections to [the] Election and Recommendations to the Board, Jan. 18, 2008, at 4.). The regional director found that these submissions were, at best, hearsay statements

by management that employees had asserted complaints about a general atmosphere of union intimidation. In light of this finding, the regional director concluded that the evidence did not support petitioners' objections because second- or third-hand allegations of intimidation, without specific allegations of voter coercion or other misconduct, could not constitute an unfair labor practice. *See, e.g.*, *NLRB v. Basic Wire Prods., Inc.*, 516 F.2d 261, 264 (6th Cir. 1975) (stating that the NLRB "properly refused to invalidate the election or to hold a hearing on the allegations" of election abuses where "[t]he only evidence proffered by [employer] was an affidavit of its Vice President to the effect that 'union people' told several employees 'that it would pay to support the Union'"). We agree. Petitioners did not "demonstrate by *prima facie* evidence the existence of substantial and material factual issues," *Semco Printing Ctr.*, 721 F.2d at 891 (internal quotation marks omitted). Accordingly, we detect no error in the regional director's decision to forgo a hearing in this case.

CONCLUSION

For the foregoing reasons, we **DENY** the petition for review of the NLRB's July 18, 2008 Decision and Order. We **GRANT** the NLRB's cross-application for enforcement.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Case 12-CA-25854

[Filed July 18, 2008]

Snell Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC and HGOP, LLC d/b/a Cambridge Quality Care, LLC, Joint Employers *and* United Food and Commercial Workers Union, Local 1625	)

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

This is a refusal-to-bargain case in which the Respondents are contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 16, 2008, the General Counsel issued the complaint on May 28, 2008, alleging that Snell Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC (Respondent Shore Acres) and HGOP, LLC d/b/a Cambridge Quality Care, LLC (Respondent HGOP), the Respondents, have violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's

certification in Case 12-RC-9281. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel,* 265 NLRB 343 (1982).) The Respondents filed an answer admitting in part and denying in part the allegations in the complaint, and asserting an affirmative defense.

On June 18, 2008, the General Counsel filed a Motion for Summary Judgment. On June 19, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed a response.

Ruling on Motion for Summary Judgment[1]

The Respondents admit the Union's request for bargaining and their refusal to bargain, but contest the validity of the Union's certification. The Respondents allege as an affirmative defense that they are refusing to bargain in order to secure judicial

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

review of the certification issued by the Board in Case 12-RC-8576.[2]

All representation issues raised by the Respondents were or could have been litigated in the prior representation proceeding. The Respondents do not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor do they allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondents have not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162, 61 S. Ct. 908, 85 L. Ed. 1251 (1941). Accordingly, we grant the Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Shore Acres, a Florida limited liability company with its principal office and place of business located in St. Petersburg, Florida, has been engaged in the operation of a

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[2] In their answer, the Respondents inadvertently referred to the representation proceeding as Case 12-RC-8576. The correct case number is 12-RC-9281.

[3] Thus, we deny the Respondents' motion that the complaint be dismissed in its entirety.

nursing home providing long-term health care and related services to elderly and disabled adults located at 4500 Indianapolis Street NE, St. Petersburg, Florida.

During the 12-month period preceding issuance of the complaint, Respondent Shore Acres, in conducting its business operations described above, derived gross revenues in excess of $100,000, and purchased and received at its St. Petersburg, Florida facility, goods valued in excess of $50,000 directly from points outside the State of Florida.

We find that Respondent Shore Acres is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

At all material times, Respondent HGOP, a New York limited liability company with its principal office and place of business located in Brooklyn, New York, has been engaged in the business of providing employee staffing services to operators of nursing homes and other health care facilities, including Respondent Shore Acres, located at 4500 Indianapolis Street NE, St. Petersburg, Florida.

During the 12-month period preceding issuance of the complaint, Respondent HGOP, in conducting its business operations described above, derived gross revenues in excess of $500,000, and performed services valued in excess of $50,000 in states other than the State of New York.

We find that Respondent HGOP is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Respondent Shore Acres has possessed control over the labor relations policy of Respondent HGOP and has administered a common labor policy with Respondent HGOP with respect to employees on the payroll of Respondent HGOP who are employed at the St. Petersburg, Florida facility.

At all material times, Respondent Shore Acres and Respondent HGOP have been joint employers of the employees on the payroll of Respondent HGOP who are employed at the St. Petersburg, Florida facility.

We find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on December 12, 2007, the Board certified the Union on March 13, 2008, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists employed by the joint Employers

> at Shore Acres Rehabilitation and Nursing Center facility located at 4500 Indianapolis Street, NE, St. Petersburg, Florida, excluding all other employees, including MDS Coordinator, registered nurses, licensed practical nurses, therapists, managerial employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About March 24, 2008, the Union, by letter, requested that the Respondents recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about March 24, 2008, the Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about March 24, 2008, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act, we shall order them to cease and desist, to recognize and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondents begin to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817, 85 S. Ct. 32, 13 L. Ed. 2d 28 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondents, Snell Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC and HGOP, LLC d/b/a Cambridge Quality Care, LLC, Joint Employers, St. Petersburg, Florida, and Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food and Commercial Workers Union,

Local 1625, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists employed by the joint Employers at Shore Acres Rehabilitation and Nursing Center facility located at 4500 Indianapolis Street, NE, St. Petersburg, Florida, excluding all other employees, including MDS Coordinator, registered nurses, licensed practical nurses, therapists, managerial employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at their facilities in St. Petersburg, Florida, and Brooklyn, New York, copies of the attached notice

marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 24, 2008.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. July 18, 2008

/s/
Peter C. Schaumber, Chairman

/s/
Wilma B. Liebman, Member

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Food and Commercial Workers Union, Local 1625, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists employed by us at Shore Acres Rehabilitation and Nursing Center facility located at 4500 Indianapolis Street, NE, St. Petersburg, Florida, excluding all other employees, including MDS Coordinator, registered nurses, licensed practical nurses, therapists, managerial employees, guards and supervisors as defined in the Act.

SNELL ISLAND SNF LLC D/B/A SHORE ACRES REHABILITATION AND NURSING CENTER, LLC AND HGOP, LLC D/B/A CAMBRIDGE QUALITY CARE, LLC, JOINT EMPLOYERS

APPENDIX C

NOT TO BE INCLUDED IN BOUND VOLUMES

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St. Petersburg, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-RC-9281

[Received March 18, 2008]

SNELL ISLAND SNF LLC d/b/a SHORE ACRES REHABILITATION AND NURSING CENTER, LLC AND HGOP, LLC d/b/a CAMBRIDGE QUALITY CARE, LLC,	)
Joint Employers,	)
and	)
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1625,	)
Petitioner.	)

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an election held on December 12, 2007, and the Regional Director's report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 49 for and 23 against the Petitioner, with one challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.[2]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been case for United Food and Commercial Workers Union, Local 1625, and that it is

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to overrule Objections 5 and 7 through 13.

the exclusive collective bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists employed by the joint Employers at Shore Acres Rehabilitation and Nursing Center facility located at 4500 Indianapolis Street NE, St. Petersburg, Florida, excluding all other employees, including MDS Coordinator, registered nurses, licensed practical nurses, therapists, managerial employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., March 13, 2008

_____

Wilma B. Liebman, Member

_____

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX D

MINUTE OF BOARD ACTION

DECEMBER 20, 2007

The Board anticipates that in the near future it may for a temporary period have fewer than three Members of its statutorily-prescribed full complement of five members.[1] The Board also recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations to the public, the four current members of the Board (Members Liebman, Schaumber, Kirsanow and Walsh) unanimously decided to temporarily delegate to the General Counsel full authority on all court litigation matters that would otherwise require Board authorization. This delegation is made under the authority granted to the Board under Sections 3, 4, 6, and 10 of the National Labor Relations Act.

Accordingly, the Board delegates to the General Counsel full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j) or Section 10(e) and (f)

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[1] The five-Member Board presently has four Members, Chairman Battista's term having expired on December 16, 2007. Two of the remaining Members, member Kirsanow and Member Walsh, are in recess appointments which will expire at the sine die adjournment of the current session of Congress.

of the Act, contempt proceedings pertaining to the enforcement of or compliance with any order of the Board, and any other court litigation that would otherwise require Board authorization; and to institute and conduct appeals to the Supreme Court by writ of error or on petition for certiorari.

The four current Members of the Board also unanimously decided to delegate to members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress. The Board is of the view that this action will permit the remaining two members to issue decisions and orders in unfair labor practice and representation cases after departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group.

The Board acted pursuant to Section 3(b) of the Act, which provides that

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. ... A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

In addition to the statutory language, the Board relied on the legal analysis and U.S. Circuit Court precedent set forth in the March 4, 2003 opinion issued

by the Office of Legal Counsel of the U.S. Department of Justice (OLC) in response to the Board's May 16, 2002 request for OLC's opinion whether the Board may issue decisions during periods when three or more of the five seats on the Board are vacant. OLC's opinion concluded that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." The Board noted that this is essentially the same theory that the Board has historically used in situations where one member of a three-member Board is disqualified or recused from participating on the merits of a case. The Board also noted that OLC's opinion does not distinguish between cases that were pending at the time of the delegation of authority by the three-member Board and cases that are submitted to the Board after the delegation and the departure of the third member.

The Board acknowledged that it is bound by OLC's opinion, but that the opinion does not require the Board to take action taken today. Instead, OLC's opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board's discretion whether or not to exercise that authority. In the current circumstances, the Board has decided to exercise its discretion to continue to function with its full powers as a two-member quorum of a three-member group designated by the Board.

These delegations will be effective as of midnight December 28, 2007, and shall be revoked when the Board returns to at least three Members following the adjournment of the 1st Session of the 110th Congress. All existing delegations of authority to the General

Counsel and to staff in effect prior to the date of this order remain in full force and effect.

WILMA B. LIEBMAN, MEMBER

PETER C. SCHAUMBER, MEMBER

PETER N. KIRSANOW, MEMBER

DENNIS P. WALSH, MEMBER

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 08-1162, 08-1214

[Filed July 8, 2009]

LAUREL BAYE HEALTH CARE OF LAKE LANIER, INC.,	)
Petitioner/Cross Respondent	)
v.	)
NATIONAL LABOR RELATIONS BOARD	)
Respondent/Cross-Petitioner	)
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1996,	)
Intervenor.	)

UNOPPOSED MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO STAY THE MANDATE

To the Honorable, the judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, respectfully moves this Court pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 41(a)(2) to stay the mandate for 90 days, pending consideration by the Solicitor General and the Board whether to file a petition for a writ of certiorari in the Supreme Court. By operation of Rule 41 (d)(2)(B), such a stay would, if the Board files such a petition and so notifies this Court, remain in effect until the Supreme Court's final disposition of the case. In support of its motion, the Board shows as follows:

1. The Board order subject to review in this case was issued by the only two Board members who remain in office, acting as a two-member quorum.

2. On May 1, 2009, a panel of this Court (Chief Judge Sentelle, Circuit Judge Tatel, Senior Circuit Judge Williams) issued its decision, which is reported at 564 F.3d 469. The panel interpreted Section 3(b) of the National Labor Relations Act ("the NLRA"), which provides in pertinent part as follows:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated

> pursuant to the first sentence hereof . . . . [29 U.S.C. § 153(b).]

The panel held that under the plain meaning of Section 3(b), an order issued by two members of the Board is beyond the Board's lawful authority if they are the only sitting members of the Board, even if they are acting as a two-member quorum of a three-member group to whom the Board has delegated all of its powers, because "the Board's ability to legally transact business exists only when three or more members are on the Board." The panel "order[ed] that the decision of the NLRB be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum."

3. The Board and the Intervenor filed timely petitions for rehearing and rehearing *en banc*, which the Court denied on July 1, 2009.

4. The government is reviewing a petition for certiorari filed in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009) ("*New Process Steel*"), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 27, 2009) (No. 08-1457), in which the Seventh Circuit reached a conclusion directly contrary to that of the Court in this case. The government's response currently is due on July 27, 2009. Now that the Court has denied rehearing here, that review will involve consideration of whether the government should petition for certiorari in this case.

5. Pursuant to FRAP 41(d)(2)(A), a stay may be granted if "the certiorari petition would present a substantial question," and there is "good cause for a

stay." *See also* Circuit Rule 41(a)(2) (motion for stay must set forth "facts showing good cause for the relief sought"); *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1980 (Court "obliged" to grant motion for stay because "we have examined the petitions for certiorari and find that the issues they tender are substantial; resultantly, we must conclude that there exists good cause to justify staying the mandate pending disposition of the petitions").

6. This Court's holding that a two-member quorum of a three-member group to whom the Board has delegated all of its powers lacks authority to issue is in conflict with those of three other circuits. *New Process Steel*, above; *Northeastern Land Servs., v. NLRB*, 560 F.3d 36 (1st Cir. 2009) ("*Northeastern*"), *reh'g denied* (May 20, 2009); *Snell Island SNF LLC v. NLRB*, __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009). Specifically, the Court's construction of the plain meaning of Section 3(b) of the NLRA is in conflict with decisions of the Seventh and First Circuits. *See New Process Steel*, 564 F.3d at 845 ("As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text."); *Northeastern*, 560 F.3d at 41 ("the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)").

The certiorari petition, if filed, would present an issue that is important and recurring in the administration of the NLRA—whether the National Labor Relations Board can administer the NLRA, including issuing decisions in unfair labor practice

cases—with only two sitting members, as it has been doing since January 1, 2008. Since that time, the Board has issued over 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders, and approximately 100 cases are pending in the courts of appeals.

The split in the circuits over what this court characterized as a "close question," 564 F.3d at 476, coupled with the importance of the issue, create a significant likelihood that the Supreme Court would grant the petition. Indeed, in arguing against the necessity for *en banc* consideration, Laurel Baye opined that "it seems almost certain that the Supreme Court will grant certiorari" if the government seeks review. And with due respect to the opinion of this Court, the Board submits that the 3-1 split in its favor among the courts of appeals objectively establishes at least a reasonable possibility that this Court's decision would be reversed.

7. There is good cause for this Court to issue a stay of mandate, apart from the substantiality of the petition. The authority of the two-member Board has been identified as an issue in 30 cases now in this Court, including this one.[1] If certiorari is granted either in *New Process* or in this case, the Supreme Court's decision will have a direct impact on those proceedings and this Court's review of those Board orders. A stay of mandate in this case will maintain

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[1] This Court has placed in abeyance 25 cases arising from 2-Member Board decisions, in many instances acting *sua sponte*. In addition, parties in four recently filed cases that have not been placed in abeyance have filed motions in which they challenge the authority of the two-member Board.

the status quo in those cases while the government's review of the two cases is ongoing, and thereby conserve resources of the Court and the parties and expedite relief to the affected parties in cases that have already been substantially delayed, should the Supreme Court grant a petition for certiorari and reverse the judgment of this Court.

8. Counsel for the petitioner and the intervenor each state that they do not oppose this motion.

WHEREFORE, the Board respectfully requests that the Court stay its issuance of mandate for 90 days.

/s/
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C.
(202) 273-2960

Dated at Washington, D.C.
This 8th day of July, 2009

Supreme Court, U.S.
FILED
NOV 16 2009
OFFICE OF THE CLERK

No. 09-328

In the Supreme Court of the United States

SNELL ISLAND SNF, LLC D/B/A SHORE ACRES REHABILITATION AND NURSING CENTER, LLC, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

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In the Supreme Court of the United States

No. 09-328

SNELL ISLAND SNF, LLC D/B/A SHORE ACRES REHABILITATION AND NURSING CENTER, LLC, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 568 F.3d 410. The decision and order of the National Labor Relations Board (Pet. App. 34a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2009. The petition for a writ of certiorari was filed on September 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress sought through

"the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); see 29 U.S.C. 151. To that end, the NLRA provides mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal," the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." National Labor Relations Act, ch. 372, § 3(b), 49 Stat. 451.[1]

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[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 22, 1936; August 27 until November 25, 1940; and August 28 until October 10, 1941. See *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, at 7 (1937); *Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941*, at 7 n.1 (1942); *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, at 8 n.1 (1943). Those two-member Boards issued three published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1395 and 28 N.L.R.B. 1-115); and 225 published decisions in 1941 (reported at 35 N.L.R.B. 24-1360 and 36 N.L.R.B. 1-45).

In 1947, Congress enacted the Taft-Hartley Act, which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor-Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." *Ibid.* Since 1947, the overwhelming majority of the Board's decisions have been issued by three-member groups constituted pursuant to the Board's Section 3(b) delegation authority.[2]

2. In 2002, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, U.S. Dep't of Justice, *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003). Prior to that request, the Board had not issued decisions when it had

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[2] See *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, at 7, 9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Labor-Management Relations* 6 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, an attachment to the prepared statement of the NLRB Chairman).

only two members since Congress expanded the size of the Board to five members in 1947. *Id.* at *1. The OLC opinion concluded that, under Section 3(b), if the Board, at a time when it had at least three members, had "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Ibid.*

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. Effective December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[3] *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 471 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009). After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the

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[3] Also effective that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Sections 10(e), (f), and (j) of the NLRA, 29 U.S.C. 160(e), (f), and (j). See Minute of Board Action (Dec. 20, 2007); NLRB, *Press Release No. R-2653, Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007) <http://www.nlrb.gov/shared_files/Press%20Releases/2007/R-2653.pdf>.

Board had delegated to the three-member group.[4] *Ibid.* Since January 1, 2008, that group, through its two-member quorum, has issued over 400 decisions.[5]

3. Petitioners operate Shore Acres, a nursing home providing long-term health care and related services to elderly and disabled adults in St. Petersburg, Florida. Pet. App. 6a, 36a-37a. On December 12, 2007, employees at Shore Acres participated in a representation election and elected United Food and Commercial Workers Union, Local 1625 (Union) as their exclusive collective bargaining representative. *Id.* at 6a. Petitioners filed 13 objections to the election; a regional director of the NLRB reviewed the objections and recommended that they be overruled in their entirety. *Id.* at 6a-7a.

On March 13, 2008, the Board—made up of the two sitting members acting as a quorum of the three-member group to which the Board had delegated its full powers—adopted the Regional Director's recommendation and certified the Union as the employees' exclusive-bargaining representative. Pet. App. 7a, 45a-47a. Petitioners subsequently refused to recognize and bargain with the Union. *Id.* at 7a-8a. The Union filed an unfair labor practice charge on May 16, 2008, and on May 28,

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[4] On July 9, 2009, the Senate received the President's nomination of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009).

[5] On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See Susan J. McGolrick, *Two Circuits Divide on Authority of Two-Member Board to Issue Rulings*, Daily Labor Rep. (BNA) No. 83, at AA-1. The published decisions and summary judgment rulings are reported and listed in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (104 decisions as of November 12, 2009).

2008, the Board's General Counsel issued a complaint alleging that petitioners' refusal violated Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5). Pet. App. 8a, 34a.

On July 18, 2008, the two-member Board issued its decision and order agreeing with the General Counsel that petitioners' refusal to bargain with the Union violated Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5). Pet. App. 34a-44a. The Board ordered petitioners to recognize and bargain with the Union. *Id.* at 41a.

4. Petitioners filed a petition for review of the Board's order in the United States Court of Appeals for the Second Circuit. Pet. App. 8a. The Board cross-applied for enforcement of its order, and the court of appeals consolidated the cases. *Id.* at 8a-9a. Petitioners challenged the authority of the two-member quorum of the delegee group to issue the decision and order, and disputed the Board's finding that petitioners had engaged in unfair labor practices. *Id.* at 8a-10a, 31a. The court of appeals granted the Board's cross-application for enforcement and denied petitioners' petition for review. *Id.* at 33a.

On the question of the Board's authority to operate with its two remaining members, the court of appeals first stated that it would review the Board's continuing authority under the two-step process set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 10a-11a. Under that analysis, the court first inquired whether "Congress has directly spoken to the precise question at issue." *Id.* at 11a (quoting *New York ex rel. N.Y. State Office of Children & Family Servs.* v. *United States Dep't of Health & Human Servs.' Admin. for Children & Families*, 556 F.3d 90, 97 (2d Cir. 2009)).

The court looked first to the decisions of the three other courts of appeals that had considered the authority of the two sitting Board members to issue decisions, and noted that no two circuits had agreed in both their reasoning and result. *Id.* at 13a-19a.

Proceeding to its own analysis, the court of appeals upheld the Board's initial delegation of authority to the three-member group, rejecting petitioners' argument that the delegation was an unlawful "sham" because the Board knew that the group would soon be reduced to two members. Pet. App. 19a-21a. The court found "more difficult" the question whether that panel had "lost its authority once the NLRB as a whole lost its quorum," noting that the circuit split suggested an ambiguity in the statute. *Id.* at 21a. In the court's view, "nothing in the statute itself explains what happens to a duly constituted *panel* of the [Board] when the *Board* itself loses its quorum." *Ibid.* Nor, the court concluded, did either canons of statutory construction or the legislative history of the 1947 amendments to the NLRA shed sufficient light on Congress's intent to resolve the question. *Id.* at 22a, 26a-29a.

Concluding that the statute is ambiguous as to the continuing authority of the remaining two members of the delegee group, the court of appeals proceeded to the second step of the *Chevron* analysis, which counsels courts to defer to an agency's reasonable interpretation of a statute it administers. Pet. App. 29a-30a. The court emphasized that, while the Act "does not expressly provide that a panel retains jurisdiction where the Board loses its quorum, neither does the Act state that the panel loses jurisdiction in such circumstances." *Ibid.* The court found reasonable the Board's position that a two-member quorum of a three-member group to which

the Board validly delegated its powers may continue to exercise those powers. The court therefore held that the "panel in this case was a lawfully convened panel of three members" and that, because the panel retained a two-member quorum, it "continued to operate in accordance with section 3(b) of the Act after one of its members ceased to serve on the Board and even though the Board itself lost a quorum." *Id.* at 30a.

The court of appeals went on to reject petitioners' challenge to the Board's unfair labor practice findings. Pet. App. 31a-33a.

ARGUMENT

Petitioner asks this Court to decide whether Section 3(b) of the NLRA authorizes the NLRB to act when only two of its five positions are filled, if the Board previously delegated its full powers to a three-member group of the Board that included the two remaining members. On November 2, 2009, this Court granted the petition for a writ of certiorari presenting the same question in *New Process Steel, L.P.* v. *NLRB*, No. 08-1457 (*New Process*). The Court therefore should hold the petition in this case pending its resolution of *New Process* and then dispose of the petition accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *New Process Steel, L.P.* v. *NLRB*, cert. granted, No. 08-1457 (Nov. 2, 2009), and then should be disposed of accordingly.

Respectfully submitted.

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